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Betty J. Wickes v. State Farm Mutual Automobile Insurance Company, An Illinois Corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UT

BETTY J. WICKES,
Plaintiff and Appellant,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY, an Illinois
corporation,
Defendant and Respond

BRIEF OF RESP

STATE FARM
AUTOMOBILE INSU

Appeal from the District Court
The Honorable D. Fran

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

Page

STATUTES CITED

TREATISES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

BETTY J. WICKES,
Plaintiff and Appellant,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation,
Defendant and Respondent.

Case No. 12598

BRIEF OF RESPONDENT

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

NATURE OF THE CASE

This is an action to recover $10,000 as the "death benefit" claimed to be owing to the plaintiff as beneficiary under an automobile insurance policy issued by the defendant to the plaintiff and her deceased husband, Homer W. Wickes.

DISPOSITION IN LOWER COURT

Both parties moved for Summary Judgment in the lower court based upon all the pleadings and all other documents in the file, including Interrogatories, Request for Admissions and Answers thereto, Affidavits and dep-

ositions. The District Court, by the Honorable D. Frank Wilkins, granted the defendant's Motion for Summary Judgment of dismissal of plaintiff's complaint and denied the plaintiff's Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

The defendant and respondent seeks affirmance of the Judgment of the trial court in favor of the defendant.

STATEMENT OF FACTS

For the most part, defendant agrees with the statement of facts as set forth in plaintiff's brief. However, there are some additional facts that should be set forth and some clarification made of certain other claimed facts.

Defendant submits that this is an uncomplicated case both factually and legally although it is conceded that it is an unfortunate case from the plaintiff's standpoint in that there unquestionably was $10,000 that the plaintiff could have realized upon as a death benefit under an automobile policy issued by the defendant had a premium been paid eight days earlier than it was paid. This is all the more unfortunate because the uncontradicted evidence is that State Farm's Sales Agent James G. Starbuck had a telephone conversation with plaintiff's son, James R. Wickes, who was then acting for the plaintiff, and urged that the premium be paid at a time when there was still six days left in which it could be paid and the $10,000 collected (Affidavit of James G. Starbuck, para. 6). Nevertheless, the premium was not paid at that time. For reasons that had nothing to do with defendant, State Farm,

the check for the premium payment was not put in the mail to State Farm until 16 days after the expiration date of the policy and not received by State Farm until two days later or 18 days after the expiration date of the policy.

Plaintiff's failure to pay the premium in time was unfortunate. Certain of her other problems disclosed in her brief were tragic. Not only did she lose her husband in this automobile accident of August 2, 1969, but as pointed out by her attorney in her brief and "while not appearing in the record," her son James R. Wickes was killed in a plane crash subsequent to his deposition being taken in this case. On the somewhat more positive side to these tragedies, although also "not appearing in the record," is the fact that Mrs. Wickes' husband's death resulted from an accident involving another State Farm insured with high liability coverage and the claim for Mr. Wickes' death was settled by State Farm's payment to his heirs, including Mrs. Wickes, of $60,000.

There is no question in this case but that the State Farm policy in question expired, according to its terms, at midnight on August 1, 1969, and prior to Homer W. Wickes' accident or death. (Copy of policy is attached to Request for Admissions and genuineness thereof is admitted in Answers to Request for Admissions.) It is also conceded that no premium was paid or tendered to State Farm following the expiration date of the policy and until August 16, 1969 when plaintiff's $48 check was mailed to Agent Starbuck by plaintiff's son from Phoenix, Arizona and was received by Starbuck on August 18, 1969 (Affidavit of Starbuck, para. 8 and Exhibit "A" attached thereto).

The return address of the envelope in which this check was sent indicated the insured's new address was "Betty Wickes, 6547 North, 44th Ave., Glendale, Ariz. 85301." In the letter accompanying the check, James Wickes advised that the $48 was for payment of the insurance on the 1962 Olds, this being the vehicle Mrs. Wickes had taken to Arizona. He further advised Mr. Starbuck that the policy should be issued only in Mrs. Wickes' name and his father's name should be deleted from the policy (Affidavit of Starbuck and Exhibit "A" attached thereto).

Both Mrs. Betty Wickes and James Wickes testified that they were very concerned following Mr. Wickes' death and at the time the $48 premium was mailed by James Wickes on August 16, 1969 that there be coverage with State Farm on the 1962 Oldsmobile *for the future* (Betty Wickes' deposition, pages 7, 14, 15, 16 and 22 and James R. Wickes' deposition, page 27). Defendant submits that this concern is of considerable importance in this case and their testimony relating to it will be referred to in more detail under the Argument in Point III of this brief.

After receiving the $48 premium on August 18, 1969, Agent Starbuck sent the same to State Farm's Greeley, Colorado office which then serviced all State Farm policyholders in Utah, Arizona and several other Western States (Affidavit of Starbuck, para. 8). Thereafter, State Farm issued to Mrs. Wickes a new policy effective on the date Agent Starbuck had received the premium (Affidavit of A. F. Smith, para. 4). As requested by Mrs. Wickes,

the new policy contained all the coverage afforded by the old policy including "S Coverage," and it was issued to her at her new address in Glendale, Arizona. The new policy period was August 18, 1969 to the next regular expiration date, February 1, 1970. Since premiums on automobile insurance policies in Arizona were slightly higher than in Utah, there was no refund on the $48 even though the policy was out of force for 17 days during the six-month policy period (Affidavit of A. F. Smith, para. 4).

In the usual case of this kind, the insured is contending that the agents or representatives of the insurance company said or did something during the period while there was still an opportunity to pay the premium and keep continuous coverage that induced or caused the insured not to pay and which serves as an excuse for late payment. There are no facts to support that kind of a claim in this case. In fact, the only contact between plaintiff or her family and State Farm's representatives prior to August 10, 1969, (which is the expiration date of the policy in question, plus ten days) and upon which such a claim might be predicated, is completely unfavorable to the plaintiff's position. This is the telephone conversation between Agent Starbuck and James R. Wickes that both acknowledge took place on Monday, August 4, 1969. When one reads the Affidavit of Starbuck and the testimony of James R. Wickes in his deposition, it will be seen that there is very little in dispute as between these two as to what was said about payment of the premium and the "S Coverage." James Wickes admitted that after he telephoned Starbuck on Monday, August 4th, and told

the latter of his father's death in an accident the preceding Saturday (Starbuck did not know of the accident before the call) that Starbuck brought up the subject of "S Coverage" and the death indemnity and told James Wickes that there was an amount that then could be paid to his mother by reason of the death of his father (James R. Wickes' deposition, pages 9 and 10). James Wickes said he wasn't sure whether Starbuck mentioned a figure of $10,000 or $5,000 as constituting the amount of the indemnity. It is true that James Wickes did not flatly admit that in this conversation Starbuck warned him that the premium was then overdue and had to be paid within ten days from August 1st or the coverage would be lost and the indemnity not paid. This, among other things, is what Starbuck swears he told James Wickes during this conversation (Affidavit of Starbuck, para. 6). However, James Wickes did admit that Starbuck could have told him this during the conversation (James R. Wickes' deposition, page 12), and he further admitted that if this is what Starbuck states was said in this conversation, that he "wouldn't be able to agree or disagree" with such a claim (James R. Wickes' deposition, page 13 and see also his deposition at pages 19 and 30). Certainly there is no claim by James Wickes, the plaintiff, or anyone else that Starbuck mislead them in to believing that the Wickes had more than ten days from August 1st to pay the premium.

In support of her claim that she didn't have to pay the premium by August 10, 1969, and could still have continuous coverage, plaintiff relies upon claimed representations made to her by a State Farm sales agent in Arizona named Osborne. More will be said about this claim under Point III. of this brief. However, it should be kept in mind that Mrs. Wickes contacted Osborne for the first time on September 3, 1969, after she had received a State Farm notice the day before that raised a question in her mind as to whether her $48 check mailed on August 16th had been received and whether she then had coverage in Arizona on the 1962 Olds. She had then telephoned her son James, and he had directed her to get in contact with a State Farm agent in Arizona (Betty Wickes' deposition, page 14). She had selected Osborne by looking in the telephone directory and finding he was the closest agent to her home (Betty Wickes' deposition, page 17). Prior to this call being made upon him, Osborne had never seen nor talked to any of the Wickes, and he knew absolutely nothing about events involving the Wickes and State Farm prior thereto. After talking to Osborne and to be absolutely sure of having coverage, another $48 check was sent to State Farm. However, this check was returned uncashed to Mrs. Wickes since State Farm had already placed coverage upon its receipt of the earlier check.

All of the facts indicate that in the heartache and confusion that followed the death of Homer W. Wickes, an unfortunate mistake was made and that neither Mrs. Wickes nor James R. Wickes paid prior to August 10th the premium that James Wickes had been told by Agent

Starbuck should be paid. The check was finally written out by Mrs. Wickes on August 13, 1969, and was apparently given by her to James Wickes on that date in Salt Lake City to be mailed. Although it is of little significance because late even then, it was not mailed until three days later and on August 16th from Phoenix. James Wickes admitted that what probably occurred was that he forgot to mail it in Salt Lake City and then did not mail it until after the family had arrived in Arizona (James Wickes' deposition, page 25).

Some time later the plaintiff did make demand upon the defendant for the $10,000. The defendant investigated and then denied liability on the grounds that the policy and coverage had expired on August 1, 1969, and since its offer to reinstate the policy within ten days from that date with no out of force period had not been accepted, that there could be no coverage for the death which occurred on August 2, 1969.

ARGUMENT

POINT I.

"S COVERAGE" IS VEHICLE INSURANCE, NOT LIFE INSURANCE, AND IS NOT SUBJECT TO THE STATUTORY 30-DAY GRACE PERIOD REQUIREMENT FOR LIFE INSURANCE.

Plaintiff's position under Point I. of her brief that we are dealing here with life insurance rather than vehicle insurance and that therefore the 30-day grace period for life insurance must apply, is somewhat difficult to understand. This is so because of a provision of the Utah statutes found in the Insurance Code that deals expressly

with the very type of insurance involved in the "S Coverage" of the State Farm policy in question. This section of the statute reads as follows:

> 31-11-6 'Vehicle Insurance' Defined — (1) Vehicle insurance is insurance against loss or damage to any land vehicle or aircraft or to property while contained therein or thereon, or being loaded or unloaded therein or therefrom, and against any loss or liability resulting from or incident to ownership, maintenance, or use of any such vehicle or aircraft.
>
> (2) *Insurance against accidental death* or accidental injury *to persons while in,* entering, alighting from, adjusting, repairing, cranking, or caused by being struck by *a vehicle,* or aircraft, *when such insurance is issued as part of insurance on the vehicle,* or aircraft, *shall be deemed to be vehicle insurance.* (Emphasis added).

Plaintiff's brief, without quoting it, refers to the above section of the statute and attempts to downgrade its significance by stating that it is found in those statutes in the Insurance Code "relating to the amount of capital funds that insurance companies are to have prior to being allowed to transact business within the State of Utah," and that this chapter is "primarily concerned with what types of insurance companies are required to have what amounts of capital funds." In fact, this chapter of the Insurance Code is entitled "CAPITAL FUNDS REQUIRED AND KINDS OF INSURANCE," and it is clear from reading all sections of the statutes contained therein that not only does it set forth the requirements for capital funds but that it also defines a number of different kinds of insurance. It is the only place in the Insurance Code

30 days as far as "S Coverage" was concerned. Consider also the record keeping and notification difficulties that would be created. Instead of the insurer being able to send out expiration notices giving a single uniform expiration date for all coverages, a different type notice would be required for those policies having "S Coverage" so that the notice could differentiate between the normal expiration date for the other coverages and the additional 30-day grace period which applied to the "S Coverage."

If this court were to hold that the "S Coverage" involved here is life insurance and not vehicle insurance, then this would involve not only the 30-day grace period provisions of 31-22-2, but it might involve other provisions of Chapter 22 of the Insurance Code (31-22-1 et. seq. U.C.A., 1953). This is so because 31-22-1 requires that all life insurance policies issued in Utah contain certain of the requirements set forth in Chapter 22. Included among these sections of this chapter are requirements for life insurance policies relating to incontestibility, (31-22-3) dividends, (31-22-6) policy loan, (31-22-7) reinstatement, (31-22-9) and several other sections. Some or all of these provisions might be construed by a court to apply to such a coverage as "S Coverage" if it were treated as life insurance rather than vehicle insurance. It is apparent that the Legislature has determined that the regulation of life insurance policies and vehicle insurance policies, including those with a coverage such as "S Coverage", are to be treated differently and governed by different requirements. It is also apparent that in order to avoid the problems that have been referred to above, and prob-

ably a number of other problems, that the Legislature, in its judgment, enacted 31-11-6 (2) U.C.A., 1953, including the provision specifically stating that such coverage would be deemed to be vehicle insurance.

POINT II.

LOSSES WHICH OCCURRED WITHIN TEN DAYS AFTER THE EXPIRATION DATE ARE NOT COVERED UNLESS THE PREMIUM WAS RECEIVED WITHIN THAT TIME.

Plaintiff by Point II. of her brief is attempting to rewrite the vehicle insurance contract that existed between herself, her late husband and State Farm by claiming, in effect, that the policy period was not six months but rather six months and ten days.

As it relates to the policy period, the State Farm policy in question provides as follows:

> The policy period shall be as shown under 'Policy Period' and for such succeeding periods of six months each thereafter as the required renewal premium is paid by the insured on or before the expiration of the current policy period. The 'Policy Period' shall begin and end at 12:01 A.M., standard time at the address of the named insured as stated herein. The premium shown is for the policy period and coverages indicated on page 1.
>
> (The foregoing is para. 1 of the Declarations on page 10 of the policy.)
>
> Policy Period, Territory. This insurance applies to accidents during the policy period which occur anywhere.

(The foregoing is para. 17 of the policy Conditions relating to Insuring Agreement IV., [i.e. "S Coverage"] found on page 8 of the policy. Another provision of Insuring Agreement IV. provides the Death Indemnity would be paid if the death occurs within 30 days from the date of the accident.)

POLICY CONDITIONS — APPLICABLE TO ALL COVERAGES UNLESS OTHERWISE NOTED

* * * * *

(1) to continue such coverage in force until the expiration of the current policy, and

(2) to renew this policy for the succeeding policy period, **** Such renewal shall be at the rates legally in effect at the time thereof.

These agreements shall be void and of no effect:

(a) If the premium for the policy is not paid when due; ****

(The foregoing is found on pages 8 and 9 of the policy.)

It is unquestioned that the policy period in question expired on August 1, 1969 (Affidavit of A. F. Smith, para. 2). There is nothing whatever in the policy that would indicate that there could be continuous coverage thereafter if the renewal premium were not paid by the expiration date. That is, no provision of the policy gives the policyholder the contractual right to keep continuous coverage by paying the premium within ten days after the expiration date. It is to be noted that the semi-annual premium notice (Affidavit of A. F. Smith and Exhibit 1 attached thereto) which is mailed to the policyholder 30

days prior to the due or expiration date, makes no mention of any ten-day period and advises the policyholder only that "payment by due date continues this policy in force for six months."

The only notification a State Farm policyholder receives that he may pay within ten days after expiration and keep continuous coverage is given him in an expiration notice (Affidavit of A. F. Smith and Exhibit 2 attached thereto) which is referred to in plaintiff's brief and hereafter for simplicity sake as a "10-40 notice" and which is mailed three days after the expiration date and if the premium has not been received. This notice advises the policyholder as follows:

> To have continuous protection, make payment to the Company or a State Farm agent within 10 days after policy due date. If payment is not made within 10 days after due date, but is made in less than 40 days, protection will be reinstated as of date payment is received by the Company, subject to established Company procedures.

Plaintiff calls this ten-day period a "grace period" and contends that if the loss occurs during it, there is coverage regardless of premium payment also being made during the ten days. She further contends that even if the premium is never paid, there is still coverage and the premium is to be deducted from what is owed on the loss. Since State Farm's policy, which is its only contract with its insured, never even mentions any ten-day period and since no Utah statute requires any such period in a vehicle insurance policy, it is difficult to understand how this can be called a "grace period" as plaintiff claims the

authorities define that term. Rather, it is apparent from elementary principles of contract law (Reinstatement of the Law of Contracts, section 24) that what is involved is an offer by State Farm to its insured which may be accepted by the insured according to its terms but if not accepted has no legal significance.

Defendant has been able to find two cases which are closely in point to the instant case including the issue involved in Point II. of this brief. These are: *McClure v. State Farm Mutual Automobile Insurance Co.,* 148 S.E.2d 475 (Georgia 1966) and *State Farm Mutual Automobile Insurance Co. v. Robison,* 461 P.2d 520 (Ariz. 1970). Plaintiff's counsel cites these cases in his brief but dismisses them as "poorly reasoned." It is submitted that they are well reasoned and that they place an interpretation on the ten-day period that is the only logical one that can be given it.

In the *McClure v. State Farm* case Mrs. McClure's policy included a coverage for a $5,000 accidental death indemnity and her son James was an insured under this coverage. The policy expired on July 18, 1963. James was killed on July 26, 1963, and it appeared that the renewal premium was not paid by Mrs. McClure until August 2, 1963. She sued State Farm for the $5,000 and the trial court granted a Summary Judgment for State Farm which the appellate court affirmed. The court in the McClure case indicates that she had received a notice from State Farm similar to the "10-40 notice" in this case. The argument was made there as it is being made by plaintiff here that the overall effect was to make this

ten days into a "grace period" and that there was coverage during that period even though the premium payment was made later. Concerning this contention, the court stated as follows at 148 S.E.2d page 477:

> We think this position is untenable. There is no provision for a 'grace' period in the policy. The policy of the company to provide continuous protection if the premium was paid within 10 days after the expiration date of the policy constituted an offer by the insurance company to the insured which required acceptance of the insured by the actual payment of the premium, or part thereof, possibly, in order to constitute a contract. There is no showing in this case whatsoever that the premium was paid or tendered to the insurance company within the 10 day period in which continuous protection could be procured. Neither is there any fraud alleged against the insurance company, nor any other fact, which in law could be said to have deterred the plaintiff from paying the premium within the said 10 day period. The rule which applies to an event's occurring within a 'grace' period provided in an insurance policy does not apply in such a case as this where there is no binding contract on the part of the insurance company to pay a loss occurring within the 'grace' period. The situation in this case is that the insurance company offered the insured the opportunity to buy and pay for protection during the 10 day period by the actual payment of the premium. This offer the insured did not accept and it follows that the insurance company was not obligated to pay the loss under count 1.

In the *State Farm v. Robison* case, the insured, Mrs. Robison, had a State Farm automobile policy which expired on May 18, 1964. On May 22, 1964, Mrs. Robison

was involved in an automobile accident which involved certain coverages of the policy. Mrs. Robison knew that she had ten days following May 18th or until midnight on May 27th within which to pay the premium and keep continuous coverage. However, for various reasons detailed in the opinion, Mrs. Robison did not end up tendering the check to State Farm until June 15, 1964. Primarily based on facts which it believed gave rise to an estoppel as against State Farm, the trial court found coverage but the appellate court reversed and held there was none. As in the McClure case and in the instant case, Mrs. Robison's attorney contended that the ten-day period was a "grace period." On this subject matter, the Court stated as follows at 461 P.2d pages 523 and 524:

> Initially, we consider it necessary to clarify the legal effect of the following provision in the expiration notice sent to the insured:
>
> > 'Payment within 10 days after due date will reinstate your policy as of the policy due date.'
>
> It is not disputed that it was the policy of the company to provide continuous protection if the premium was paid within this 10 day period. * * * *
>
> No grace period exists unless there is either a statutory provision or a provision in the contract of insurance. Sahlin v. American Casualty Company of Reading, Pennsylvania, 103 Ariz. 57, 436 P.2d 606 (1968). Here, the policy did not provide for a grace period and the Arizona statutes require none. Mrs. Robison's loss, therefore, cannot be construed as one occurring during a 'grace' period.

Under Point II. of her brief, plaintiff cites a number of authorities which she claims support her position. A reading of these authorities will show that none of them is specifically in point to the instant case. The issue before the Court here is whether the insurer is liable where the loss occurs during a period following the expiration date and during which payment may be made to provide continuous coverage, but where the payment is made or tendered *after this period.* These are the facts involved in the instant case and which were involved in both the McClure and Robison cases. Defendant has found no other cases involving that specific fact situation and it is not the one involved in any of the authorities cited by the plaintiff.

Defendant will hereafter consider plaintiff's authorities cited in her brief and will point out wherein they are distinguishable from this case.

The definition of "grace period" which is quoted from Black's Law Dictionary, 4th Edition by plaintiff gives her no help since if applied here, would exclude coverage because the premium was not paid during the ten-day period. *Tucker v. New York Life Insurance Co.,* 155 P.2d 173, involved the interpretation of a life insurance policy and whether the death resulted from injury or disease. No question of late payment of premium or grace period is involved in it. Perhaps it was cited only for the generality quoted from it on page 13 of plaintiff's brief which favors liberal construction of insurance policies in favor of the insured. Even on this remote basis,

it is difficult to fathom what the provisions of the policy in question are here and for which plaintiff seeks such a liberal construction.

Appleman, Insurance Law and Practice, Sections 7960 and 7961, is cited for the general rule "that if the insured dies during the grace period, his death is covered." One problem with this being pertinent to the instant case is that Appleman is talking about life insurance and policies in which there unquestionably was a grace period. No cases are cited by Appleman in those sections which would support the proposition urged here by the plaintiff and which would lend weight to the argument that ten days should be added to this policy of vehicle insurance as a grace period. Moreover, a reading of the cases cited by Appleman in support of the proposition quoted by the plaintiff in her brief demonstrates that most involve a fact situation where not only the loss occurred in the grace period but where the premium was also paid or tendered during that period.

Blue Cross-Blue Shield of Alabama v. Colquitt, 168 So. 2d 251, cited by plaintiff on page 13 of her brief, involved a loss occurring on February 20th after the February 15th expiration date of the policy and where the court ordered the amount of the loss paid less the premium which had not been paid. However, the critical distinction between that case and the instant one is that the *policy itself expressly granted* the insured "a grace period of ten (10) days."

Meadows v. Continental Assurance Co., 89 F.2d 256, cited by plaintiff on page 14 of her brief is claimed by plaintiff to have "held that where the death of the insured occurred during the grace period, the policy must be paid, less the amount of any premiums owing to the company by the insured." This was neither holding nor dicta in that case and, in fact, the insurance company and not the beneficiary of the insured was the prevailing party there both in the trial court and in the Court of Appeals. The life insurance policy involved in the Meadows case did have an express provision in it which provided essentially as has been quoted from the plaintiff's brief, but the issue decided by the court there related to an interpretation of the word "default" in the policy and is totally unrelated to what is involved here.

Pickens v. State Farm Mutual Automobile Insurance Co., 144 S.E.2d 68 (So. Carolina 1965) is cited by plaintiff on page 13 of her brief, and it is claimed to represent the "weight of authority, and the better reasoned view," presumably in support of plaintiff's contention that the ten-day period is a "grace period." Although the Pickens case is at least somewhat similar factually to the instant case, it is of no help whatever to plaintiff's contention under Point II. of her brief and actually is more supportive of defendant's position than plaintiff's.

In the Pickens case, a death indemnity was involved under a vehicle policy and the death of the insured occurred after the expiration of the policy but within ten days. There, as here, State Farm had sent the insured an expiration notice within a day or two after the expiration

date advising that continuous protection could be had if the premium was paid within ten days. The crucial distinction between that case and the instant one is that the court held in Pickens that there was a jury issue as to *whether a tender of the premium to State Farm had been made by the brother of the deceased within the ten days.* Obviously, we would have quite a different case here if the Wickes were claiming that they had paid or tendered the premium within the ten days. In the Pickens case, State Farm contended that since the ten-day provision was not in the policy and was merely an offer which had to be accepted by the deceased during his lifetime, that there was no acceptance of the offer and no obligation to pay even assuming the tender by the brother of the premium within the ten days. State Farm makes no such contention here and the facts are completely distinguishable. In the Pickens case and concerning this ten-day period which expired on March 12th, the court stated the following at 144 S.E. 2d page 71:

> Contrary to the contention of the appellant that the expiration notice was merely an offer to renew, which required the acceptance of Pickens during this lifetime, we think the language of the notice is indicative of an intention on the part of the appellant to give Pickens through March 12 to pay the premium, and to afford him continuous protection in the meantime, *provided the premium be paid within the time allowed.* (Emphasis added).

POINT III.

NO WAIVER OF TIMELY PAYMENT OF THE PREMIUM OCCURRED BY ACCEPTANCE OF IT AFTER NOTICE OF THE LOSS SINCE NO PART OF THE PREMIUM PAID WAS EVER APPLIED TO THE PERIOD OF THE LOSS AND IT WAS ONLY APPLIED FOR FUTURE COVERAGE FROM THE DATE RECEIVED.

Plaintiff argues in Point III. of her brief that the "10-40 notice" is immaterial and its terms irrelevant to the disposition of this case. She goes on to contend that defendant's reliance on the "10-40 notice" is misplaced because this is an attempt by defendant to vary the terms of the policy in a way not permitted by statutes or the policy. Finally, plaintiff concludes from this that since we are to act as if this notice never existed or was sent, that the action of State Farm in accepting the premium on August 18, 1969, constitutes a waiver of the policy terms requiring prompt payment. By this reasoning, which plaintiff states is an alternative to her theory in Point II. that the "10-40 notice" created a "grace period", plaintiff concludes that there was coverage on August 2, 1969 when Homer W. Wickes was killed.

Plaintiff gains nothing whatever in claiming coverage for August 2nd if we disregard entirely the "10-40 notice." This is so because there is absolutely nothing that State Farm or its representatives are claimed to have said or done up to the time the premium was received on August 18th that could possibly be said to have led Mrs. Wickes to believe that the defendant's acceptance of the

premium on that date was a waiver of the policy provisions requiring prompt payment or no coverage. An eminent authority has defined "waiver" as follows:

> ****Waiver is the intentional relinquishment of a known right; it is the expression of an intention not to insist upon what the law affords. It is consensual in its nature; the intention may be inferred from conduct, and the knowledge may be actual or constructive, but both knowledge and intent are essential elements. Prosser, *The Making of a Contract of Insurance in Minnesota,* 17 Minn. L. Rev. 567, 594.

When one examines all of the facts in this record it can be seen that plaintiff's argument on "waiver" and for continuous coverage from August 2nd forward cannot possibly be sustained. Let us examine the facts and see if State Farm's acceptance of this premium constituted an "intentional relinquishment" of its right to be paid promptly or an indication of that Company's "intention not to insist on what the law affords."

It would be of some assistance to plaintiff on her waiver theory if State Farm had on one or more occasions prior to August 18, 1969 accepted a late premium after the ten days from the expiration date and still granted continuous coverage. However, no such instance has been cited by plaintiff as having occurred during the approximately four years of coverage which the family had with State Farm prior to August 1, 1969. To the contrary, the record indicates that in all instances before that date when the Wickes did pay their premium more than ten days after the expiration date, that they were never given continuous coverage but that there was an out of force period.

Agent Starbuck recalled that this had occurred on two occasions prior to August 1, 1969. (Affidavit of James G. Starbuck, para. 3). Also, it is significant that the last premium that was paid by the Wickes before August 1, 1969, was paid late on February 18, 1969 (rather than February 1, 1969, the expiration date of that policy) and at that time the policy was only reinstated on the date payment was received and to run to the end of the regular six-month period which ended August 1, 1969. Since the policy was out of force from February 2nd through February 17, 1969, an amount of $4.20 representing the premium for the out of force period was refunded to the Wickes at that time (Affidavit of A. F. Smith, para. 3). Thus, not only are the Wickes unable to factually support a claim that their prior experience with State Farm could have led them to expect continuous coverage when the premium was paid on August 18, 1969, but the very reverse is true. Their most recent experience in paying a premium should have caused them to expect that State Farm would handle the August premium and coverage just as it had the preceding February and this is exactly the way they were handled.

The Wickes make no claim that anything occurred during the ten days following the August 1, expiration date that could be used by plaintiff as a basis for her claim of waiver. To the contrary again, and as pointed out in the Statement of Facts portion of this brief, the only contact with State Farm during that period is unfavorable to plaintiff's position. This was James Wickes' telephone conversation with Agent Starbuck. The latter's testimony

in his affidavit is that he told James Wickes the premium payment was then overdue and had to be paid within ten days from August 1st or the death benefit would be lost (Affidavit of James G. Starbuck, para. 6). James Wickes neither admitted nor denied that he was told this and said he simply couldn't remember (James R. Wickes' deposition, pages 13, 19 and 20). James Wickes did admit that within a day or two after his returning to Salt Lake City on August 3, 1969, that he found at the church among his father's papers the "semiannual premium notice" which is Exhibit 1 to A. F. Smith's Affidavit and marked Exhibit 1 and 2 to the deposition of James R. Wickes (James R. Wickes' deposition, pages 17 and 18). This notice advised that the premium had to be paid by August 1, 1969. James Wickes admitted that during the ten days following August 1, 1969 that he became aware that the premium on the 1962 Olds was then overdue and that he knew this either from his telephone conversation with Starbuck or from the premium notice (James R. Wickes' deposition, page 22). During this period, James Wickes did have a notion that there was some period of time after the expiration date during which the premium could be paid and still have continuous coverage. However, he didn't know just how long this was although he admitted Starbuck could have told him it was ten days (James R. Wickes' deposition, page 19). In any event, he made no claim that Starbuck told him it could be paid later than 10 days or certainly 18 days after the expiration date.

If Agent Starbuck is believed, then there cannot possibly be a waiver since he advised plaintiff's representative, James Wickes, that the premium had to be paid within the ten days or no coverage. This would have been the very opposite of State Farm's waiving prompt payment which the plaintiff now claims it did. Even if Starbuck's testimony is not believed or disregarded, there is still no basis for waiver since James Wickes admits he knew the premium was then overdue and neither Starbuck nor anyone else with State Farm led him to believe that if they waited to August 18th to pay the premium, that there would be continuous coverage.

The next contact that Starbuck or anyone else from State Farm had with the Wickes after this August 4th telephone conversation was Starbuck's receipt in the mail on August 18th of James Wickes' letter dated August 13th mailed from Phoenix on August 16th and enclosing his mother's check. Plaintiff argues that by accepting this check, State Farm somehow waived its right to have Mrs. Wickes bound by the terms of the policy that expired August 1st or else waived its right to allow continuous coverage but only if the premium was paid within ten days after the expiration date. One of the difficulties of this waiver argument of plaintif's is that it is premised on an incorrect factual assumption by which plaintiff would have us believe that she paid her $48 premium to State Farm on August 18th to be accepted only on the basis that she be granted continuous coverage retroactive to August 2nd. This is simply not the fact, and it is clear both from plaintiff's testimony and also from that of her

son, James R. Wickes, that what they wanted when they paid the $48 premium was to have vehicle insurance on the 1962 Olds for the future. Nothing was mentioned in James Wickes' letter accompanying his mother's check or otherwise which conditioned the premium's being paid on State Farm's granting retroactive coverage to August 2nd as well as future coverage. This letter advised Starbuck that the $48 check was enclosed for his mother's insurance on the '62 Olds and that the insurance should be issued in her name alone deleting his father's name (Affidavit of James G. Starbuck, and Exhibit "A" attached thereto). Moreover, the conversation of August 4th between Starbuck and James Wickes and also the manner in which the February 1969 renewal premium was handled could not reasonably have suggested to Starbuck that the premium was being tendered on that basis. To the contrary, it undoubtedly suggested to him that what Mrs. Wickes wanted was immediate coverage for the future on this '62 Olds she was driving to Arizona. The record is full of statements by James Wickes and particularly Mrs. Wickes that this is exactly what she did want and that she would have been upset had there been any delay on Starbuck or State Farm's part in placing immediate coverage. James Wickes testified that at the time he mailed the premium that his mother was driving the Olds down there and needed all the coverages. He further testified that he was most concerned about getting the premium paid because he "wouldn't want the vehicle to be driven without any insurance coverage" (James R. Wickes' deposition, pages 27 and 31).

Mrs. Wickes was even more emphatic in her testimony about her concern at this time in August, 1969 for future coverage. Mrs. Wickes said she wanted the "S Coverage" for $10,000 on her life so she "was covered in case anything happened to me for the children." (Betty Wickes' deposition, page 15). She also said she wanted public liability, collision and uninsured motorist coverage because she knew "it is not good to drive a car without being covered" (Betty Wickes' deposition, page 15). She was asked if her concern in paying the $48 premium was about "the 'S Coverage' that had been on there" (i.e. the coverage for the prior period which is involved in this litigation) and her answer was to repeat "I was concerned about driving a car that was not covered" (Betty Wickes' deposition, pages 15 and 16). She testified she had told Agent Osborne on September 3rd, "Now, I don't want to take a chance, if I would be in an accident, that I would not be covered" (Betty Wickes' deposition, page 14). Finally, she admitted in her deposition that she had wanted coverage in the future even though she was not also given retroactive coverage to August 2nd, because "I did not want to be uncovered at any time" (Betty Wickes' deposition, page 22).

It is a little difficult to understand how State Farm can be said to have waived anything by accepting her money and giving her the very thing she wanted. This is so even though State Farm, through its Sales Agent James G. Starbuck, did know of the loss and Homer W. Wickes' death at the time he accepted the premium and sent it on to Greeley. However, this is of no legal significance because

the premium was never applied or used for the period of the loss but was only applied for the future coverage she wanted. If State Farm had at any time applied any part of this $48 premium to a period before or at the time of the loss, even though it may later have refunded or tried to refund it, then we would be involved with a different legal principle and one that is involved in some of the cases plaintiff cites.

Plaintiff contends that State Farm should not have accepted the $48 without first advising her or a member of her family that it was accepting the $48 check at a higher premium rate for a shorter period of time. Is it reasonable to expect that State Farm should have delayed in accepting the premium until it could have advised Mrs. Wickes or her family of these matters and perhaps obtained a commitment from her that the premium was only being accepted for future coverage and not any past coverage? It is impractical to have expected any insurance company to have done this under these facts, and it would only have delayed covering her which was the very thing she didn't want. Suppose Starbuck and State Farm had not immediately placed coverage and had delayed doing so for a few days, or more, to advise the Wickes of these matters or obtain this commitment and in the meantime Mrs. Wickes had suffered some other loss relating to this 1962 Olds. Obviously, if such had occurred, State Farm would have been responsible and would have had no excuse for not immediately accepting the premium and placing coverage.

Plaintiff apparently finds some significance on this waiver argument in defendant's having kept the entire $48 without refund while still excluding 17 days from the six months renewal period. The uncontradicted evidence is that the premium rates were higher in Arizona where Mrs. Wickes elected to move and that based on those rates, she was not entitled to a refund (Affidavit of A. F. Smith, para. 4). Mrs. Wickes herself acknowledged that she knew the Arizona rates were higher than Utah's (Betty Wickes' deposition, page 19). No claim is made that the Arizona rates were unfair or that they were not the same charged everyone else in Arizona who fit in the same underwriting category. The amount of these premiums is regulated by law and by the insurance commissioners of the various states. It is simply an emotional argument to attempt to fault State Farm here for immediately placing coverage by accepting the premium and to contend that State Farm should have delayed placing coverage until it first advised Mrs. Wickes about the higher rates in Arizona.

Plaintiff in her brief also claims a waiver by reason of Agent Osborne's claimed statement to her in Arizona on September 3, 1969, when he is supposed to have told her that if she sent in the check at that time (this check was returned to her uncashed) that the coverage would be retroactive to August 2nd. The facts concerning Mrs. Wickes' chance meeting with Agent Osborne have been detailed above under Statement of Facts and won't be repeated here. However, it is perfectly obvious for several reasons that this claimed representation made over one month after the policy had expired by a complete

stranger to whatever had occurred in Utah, cannot constitute a waiver of State Farm's right to assert there was no coverage on August 2nd. If this kind of a representation can serve as a basis for waiver, then all an insured needs to do after his policy has expired and he has suffered a loss is to find some agent who will tell him he still has coverage or even if such an agent can't be found, the insured can assert this and raise a jury question. Presumably, plaintiff would claim such a gratuitous statement can constitute a waiver if made a month, six months or a year after the expiration date. The law is clear that what Osborne is claimed to have said cannot serve as a waiver against State Farm. The insurance contract cannot be modified by an agent in this manner. See Sections 31-19-18, 31-19-20 and 31-19-26, U.C.A., 1953, and also *Barnett v. State Automobile and Casualty Underwriters,* 487 P.2d 311 (Utah 1971). The policy itself also provides that its terms may not be waived or changed except by a duly authorized policy endorsement (See para. 5 on page 8 of the policy).

In her brief plaintiff cites a number of authorities which support the principle that an insurance company may waive a provision in its policy requiring payment of premium by a given date with the penalty for non-payment being expiration, lapse or forfeiture of the policy. Defendant has no quarrel that this can occur and under appropriate facts. The difficulty with the plaintiff's authorities is that they are all clearly distinguishable on the facts from the instant case. Hereafter, defendant will refer to the authorities cited by the plaintiff and, as briefly as possible, point out wherein they are distinguishable.

Plaintiff relies upon *Loftis v. Pacific Mutual Life Insurance Company of California,* 114 P. 134 (Utah 1911). In this case as in most of those cited under Point III. by plaintiff, the loss has occurred and the insurance company thereafter accepts a premium covering the period which includes the loss and under circumstances where there is no need or desire for future coverage. In other words, the insurer on one hand has collected a premium for a period which includes the loss and on the other hand is trying to deny coverage for that period. Thus, in the Loftis case life insurance premiums were to be paid monthly by being deducted from the insured's wages and if not paid promptly, the insurance would lapse. The insured did not make sufficient wages in August and September to pay the premium and he was killed on October 14th. However, his October wages for the time prior to his death were sufficient to pay all three months and an amount to cover this was deducted from his wages and paid to the insurance company after his death and with knowledge of it. These premiums were later refunded.

The major distinction between the Loftis case and the instant case is clear. In Loftis, the insurance company accepted premiums for the period *prior to and at the time of the loss* under a policy that otherwise would have lapsed for nonpayment of these same premiums. In the instant case, State Farm never at any time applied or charged any of the $48 premium to any period before August 18th or which included the date of the August 2nd loss. From the beginning, State Farm took the premium and applied it only to future coverage. This case would be

apposite to the Loftis case and many of those cited in plaintiff's brief if State Farm had, after the acceptance of the $48 premium applied some of it to the period before it was received including the date of the loss. Also, even if State Farm had applied all of the premium as it did to future coverage and if this coverage had been unneeded or unwanted (as e.g. if the insured vehicle was destroyed, the insured was dead or another reason eliminating a need for future coverage) then an argument might be made that State Farm was inconsistently charging for coverage it denied existed. This is the pattern that runs through most of these cases cited by plaintiff on this point, and it is completely lacking in the instant case.

Plaintiff cites as authorities *Long, The Law of Liability Insurance,* Sections 17-42, and 43 Am. Jur. 2d Section 1129. Here again, Long talks about "acceptance of unearned premiums," and the quote from Am. Jur. talks about retention of premiums "covering the period of default." These may be accurate statements of the law but they do not fit the facts of this case because the defendant accepted no unearned premium nor did it retain any premium covering the period of the default.

Plaintiff cites *Seavey v. Erickson,* 69 N.W.2d 889, 244 Minnesota 232, 52 A.L.R. 2d 1144 (1955). The facts of these consolidated cases are somewhat complicated and will not be detailed here but a careful reading of these cases will show that the facts are radically different from this case. Among other grounds, the waiver of the insurer was predicated on the fact that the insurance company accepted and retained a premium on a vehicle which it

knew was totally destroyed. Also, and although there was some question about this, it appeared that the insured may actually have paid a premium for the period covered by the loss. Moreover, there were other facts involving the prior practice of the insurer in giving notice and collecting premiums and also concerning its investigation of the accident to the insured vehicle and its obtaining of statements from its insured that weighed heavily in the court's decision and which are completely lacking in the instant case. The Seavey case does have the distinction of being the only one cited by plaintiff under Point III. that involves vehicle insurance. All the others involve other kinds of insurance and mostly life insurance.

Also relied upon by plaintiff is *Sullivan v. Beneficial Life Insurance Company,* 64 P.2d 351 (Utah 1937). Here again, this case is quite complicated factually but a a careful reading of it will show that it is not closely in point to the instant case. In the Sullivan case which involved a life insurance policy with Beneficial, Sullivan had been insured for approximately 12 years but failed to make the quarterly payment that was due on October 6, 1932, and he also failed to make it within the 31-day grace period thereafter which was provided by the policy. Thereafter, Beneficial sent notice to Sullivan indicating that his interest in the policy had lapsed and was forfeited but that he could reinstate it. Mrs. Sullivan also had conversations with various officials of Beneficial in which she claimed that they told her that they would not insist upon the grace period. On December 24, 1932, Beneficial accepted from Mrs. Sullivan the quarterly premium that

was due on October 6, 1932, and that would pay the policy current to January 6, 1933. Later, Beneficial tendered premium payment back to Mr. Sullivan and tried to claim that it had been accepted initially on conditions which were never conveyed to Mrs. Sullivan when it was accepted. The holding of the Sullivan case is that the facts, including those just mentioned, gave rise to a jury question as to whether Beneficial had waived forfeiture of the policy after the insured's failure to make the October 6, 1932 quarterly premium payment or within the grace period thereafter. The essential difference in Sullivan as in Loftis from the instant case is that the insurer *accepted a premium for the same period during which in the lawsuit it tried to claim there was no coverage* and there had been a forfeiture because of non-payment of premium. This is simply not the fact in the instant case.

Plaintiff cites *Ellerbeck v. Continental Casualty Co.*, 227 P. 805 (Utah 1924). In this case a renewal certificate for a policy of health and accident insurance was mailed to plaintiff and the certificate indicated that the premium was to be paid by October 8, 1922 and, if paid, that the policy would continue in force for one year. The premium was $120 per year. Bills for the premium were sent for three months, but it was not paid. Thereafter and in December, 1922, a conversation was had between the insured and a representative of the insurance company in which the former inquired if the insured wished to keep the policy or should it be cancelled and the insured advised not to cancel it. On February 23, 1923 a partial payment of $60 was paid and was retained. On February 24, 1923 the

plaintiff went in to the hospital and it was conceded that the condition causing the hospitalization had existed before February 24, 1923. The issue therefore became whether there was coverage after October, 1922 and prior to February 24th of 1923. In Ellerbeck, the court found that there were sufficient facts by which the jury could have found (as it had) that the insurer or its authorized agents *extended credit to the insured for the payment of the premium and that the plaintiff within the period of such credit accepted the extension of credit and paid the amount of the premium.* This readily distinguishes that case from the instant one. Plaintiff in her brief attempts to draw some parallel between State Farm Agent Osborne in this case and the general agent or Continental Casualty Company in the Ellerbeck case. In the instant case the plaintiff had never dealt with Osborne until more than one month after the expiration of the policy. In the Ellerbeck case the insured had dealt with the general agent for several years and the court's holding was that this was the agent whom the jury could find had extended the insured credit to pay the premium. Also, the waiver by the agent in Ellerbeck was based on a course of dealing between himself and the insured for a substantial period *prior to the loss.*

Parker v. California State Life Insurance Co., 40 P.2d 175 (Utah 1935), also relied upon by plaintiff, is distinguishable from the instant case on the facts. In the Parker case the life insurance policy did lapse for nonpayment of premium but the insurance company made an express offer to waive the lapse if certain conditions were

complied with by the insured, Parker. It is apparent from reading the opinion that Parker did everything necessary to comply with the waiver offered by the insurer and he did this by filling out and sending to the insurer on November 5th a form of reinstatement the insurer had prepared together with a portion of the premium. Several days later and after his letter with this form and the premium had been received by the insurer, Parker was killed in an accident. The insurer learned of this and then attempted to deny coverage and return the premium, but it is perfectly obvious from reading the facts of the case that the insurance company had waived the lapse and would have continued the policy in full force but for the completely fortuitous circumstances of the insured being killed after he had complied with the conditions imposed by the insurer. The facts are somewhat similar to those in *Moore v. Prudential Insurance Co.,* No. 12388 (Utah 1971) decided within the last few weeks by this court, but they are certainly not analogous to those in the instant case.

Farrington v. Granite State Fire Insurance Co., 232 P.2d 754 (Utah 1951) is also cited by plaintiff. It is difficult to see any relevance factually between the Farrington case and the instant case or why it was cited. In the Farrington case the insurance was granted, the premiums were accepted, including a substantial portion after the loss and for the period of the loss, and then after the building was destroyed by fire, the insurance company attempted to defend primarily on the basis of some claimed misrepresentations which the court said were not material.

In *American National Insurance Co. v. Cooper,* 458 P.2d 257 (Colo. 1969) cited by plaintiff, the insurance company sent the insured a letter requesting payment of his then overdue premium and, in effect, waiving any default if he would pay the premium. A loss then occurred in the form of injuries to the insured and the premium was then tendered for the period covering the loss and was accepted by the insurance company. At no time was this premium ever returned or offered to be returned to the insured. It was also apparent from the letter sent to the insured that the insurance company considered that the policy was still in force if the insured paid the premiums and that the insurer was not considering a reinstatement where the policy would be out of force for a period of time. This was reinforced when the insurer accepted and kept the premiums *including for the period of time covered by the loss.* The court held that under these circumstances and primarily by accepting and keeping the premiums with full knowledge of the loss, the insurer had waived its rights under the policy.

Cooper v. Foresters Underwriters, Inc., 275 P.2d 675, 2 Utah 2d 373 (Utah 1954) is a case somewhat in point to the instant case although the facts are substantially different. It is cited although not relied upon by plaintiff. In the Cooper case a medical policy was involved which ran from month to month and which contained a 31-day grace period. The principal issue resolved by the court in the Cooper case was whether the loss occurred and the premium was paid within the grace period or after the grace period. The situation was that the accident giving rise to

the loss occurred in the afternoon of October 31st and the premium was paid that evening. The court held that the grace period had terminated at noon on the same date and the policy had lapsed at that time and the effect of the payment of the premium that evening was only to reinstate the policy at that time. Thus the policy was out of force at the time the loss occurred. One contention made by the plaintiff in the Cooper case was that the insurer had waived its rights to demand payment in advance of premiums by accepting premiums late at other times. The court considered this argument and acknowledged that an insurer "which, by any course of conduct, induces in the mind of the insured an honest belief, reasonably founded, that strict compliance with a stipulation for prompt payment of premiums will not be insisted on, waives the right to a forfeiture for non-payment." However, the court rejected the argument of Mrs. Cooper and said that "there were no acts on the part of the [insurer] which could be regarded as inconsistent with the contract nor as inducing a belief that the [insurer] did not intend to enforce the terms thereof."

Defendant has been unable to find any authorities that are closely in point to the instant case and which support plaintiff's theory of waiver. There simply is no basis for such an argument in this case where not even a claim is made of any acts or conduct on the part of defendant, State Farm, which occurred prior to August 10th and which could support a waiver. After that date and on August 18th, the premium was accepted and a new policy was issued but this was the very thing plaintiff wanted.

CONCLUSION

POINT I.

The death indemnity involved here, called "S Coverage", is not life insurance but is vehicle insurance by reason of the express provisions of a Utah statute (31-11-6 U.C.A., 1953). As vehicle insurance, there is no "grace period" required by law and since the policy of insurance did not provide for one, none existed in the present case.

POINT II.

The policy expired on August 1, 1969, and the loss occurred on August 2nd. By notice sent three days after August 1st, the defendant offered plaintiff the right to have continuous coverage, including on the date of loss, if the premium was paid by August 10th. On August 4th, plaintiff's son was orally advised of this offer by State Farm's Agent Starbeck. No payment of premium was made until August 18th or eight days after the offer had expired. The ten days was not a "grace period" but merely a period during which the defendant made plaintiff an offer which the plaintiff failed to accept.

POINT III.

The policy expired on August 1, 1969, and prior to the accident and loss which occurred on August 2nd. Plaintif contends that State Farm or its representatives did something that constituted a waiver of its right under the policy to be paid the premium on time. The facts

claimed by plaintiff fail to support any such theory of waiver. As stated under Point II., State Farm did offer the plaintiff the chance for continuous coverage if the premium was paid by August 10th. This was not done and the premium was mailed August 16th and received August 18th. On the latter date, State Farm issued a new policy to plaintiff and commenced immediately the coverage she wanted. No premium was ever applied or charged to August 2nd or anytime before the premium was received. This is an unfortunate case but there is absolutely nothing in this record to support a claim that State Farm waived its rights or was responsible for the premium being paid late.

The Summary Judgment granted by the lower court of dismissal of plaintiff's complaint as against the defendant should be affirmed.

Respectfully submitted

STRONG & HANNI

By .....

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I hereby certify that I mailed two copies of the foregoing brief to Allan L. Larson at 7th Floor Continental Bank Building, Salt Lake City, Utah on this 31 day of December, 1971.

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DAVID K. WINDER